

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 1-94:

MONTANA PUBLIC EMPLOYEES')	
ASSOCIATION,)	
)	
Petitioner,)	
)	FINDINGS OF FACT;
vs.)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED ORDER
)	
COUNTY OF YELLOWSTONE, MONTANA,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Montana Public Employees' Association (Petitioner) filed a petition on August 23, 1993 seeking to include ten employees of Yellowstone County, Montana (Respondent) in the Petitioner courthouse bargaining unit. On September 30, 1993, the Respondent filed a response indicating most of the positions did not possess sufficient similarities as required by statute to justify inclusion but that some of the positions identified might, with further investigation, be accepted as properly being within the courthouse unit.

Prior to hearing, the parties agreed regarding the proper unit placement of four of the ten employees. The remaining six positions were employed in the disaster and emergency services office and the data processing office.

The contested positions for inclusion or exclusion from the courthouse unit are:

1. The second secretary within the Board of County Commissioners also known as the disaster and emergency services secretary.
2. The entire data processing unit, excluding the data processing supervisor.

A hearing was held in this matter in Billings, Montana on October 13, 1994. Parties present, duly sworn and offering testimony included Montana Public Employees' Field Representative Marilyn Huestis, Commissioner Secretary Priscilla Fairlee, Administrative Officer James Kraft, Electronic Data Processing Systems Coordinator Karen Weisser, Personnel Computer Support Specialist Paige Wolf, Computer Programmer Connie Selvey, Electronic Data Processing System Administrator Paul Christopher, Data Processing Supervisor Steve Hellenthal, and Director of Personnel Lou Babovich. Documents admitted into the record included Respondent Exhibits 1, 2, and 3.

Petitioner was represented by Counsel Carter Picotte and the Respondent by Counsel Brent Brooks. Respondent waived any objection based on Administrative Rule 24.26.630 to proceeding with the hearing. Respondent's post-hearing

memorandum was received April 18, 1995 and Petitioner reply brief received May 18, 1995.

II. ISSUE

Should the second secretary within the Board of County Commissioners and data processing positions be included in the Petitioner unit?

III. FINDINGS OF FACT

1. All of the affected employees, both administrative secretary, Ms. Fairlee, and data processing unit members indicated they did not wish to be included in the Petitioner unit. All are paid on a salary basis, not the Petitioner unit pay matrix. Ms. Fairlee is primary secretary to the administrative officer for the Board of County Commissioners. His duties normally include membership on the county's union negotiating team which discusses collective bargaining matters. Ms. Fairlee is backup secretary for the Board of County Commissioners' secretary and the Office of Management and Budget. Ms. Fairlee and the primary secretary for the Board of County Commissioners, Ms. Wood, have interchanged duties for about four years. Ms. Wood has been agreed as excluded from the unit on the basis of the confidentiality of matters which she processes.

2. The data processing employees work with all courthouse offices as computer support personnel. Karen Weisser, the Electronic Data Processing System Coordinator, works primarily on administration of computer systems for the areas like taxation, finance, election, and jury selection. Her responsibilities require not only a broad computer system knowledge but also complete access to all systems and systems content which includes confidential files and system programs. Because of staff availability, scheduling, and work responsibilities, Ms. Weisser's hourly work schedule, accordingly, varies from the standard eight to five schedule followed by most unit employees.

3. Paige Wolf is a Computer Support Specialist. Her duties include computer software and hardware installation, repair, staff instruction, and acting as substitute for the computer network administrator. She has complete access to all computer systems and system information which include some confidential matters. Her work and position is a stand-alone position and no other employees in the data processing unit or the Petitioner unit could transfer to her position and perform in an immediately functional capacity.

4. Connie Selvey is a Computer Programmer. She develops and modifies computer programs and systems. Her

work includes analyzation of courthouse department computer system needs followed by program or system development and application. In her work, she is regularly exposed to or has access to confidential files and information. Ms. Selvey's position and work is also a stand-alone position and no other Petitioner unit member or data processing unit member could transfer to her position in an immediately functional capacity. The work schedule she follows does not always start at 8 a.m. and end at 5 p.m. From time to time, depending upon individual need and circumstances, she is required to work some evenings or weekends.

5. Paul Christopher is an Electronic Data Processing Systems Administrator. His work includes managing county multiple user computer systems, technical staff liaison with staff and other county departments, supervising hardware and software recommendation and installation, as well as system security. He, as does Ms. Wolf, has complete access to all computer programs and information, including confidential file information. Both he and Ms. Wolf have master keys to all courthouse county offices. His work responsibilities are individual and no other person presently employed in the Petitioner unit or the data processing unit is capable of fulfilling his work responsibilities.

6. A technical employee of the Electronic Data Processing unit, a Mr. Swimley, was a union member. He had a disciplinary problem. The union was notified. Thereafter, Mr. Swimley was terminated using the Petitioner unit disciplinary process.

IV. CONCLUSIONS OF LAW

1. Section 39-31-202, MCA and Administrative Rule 24.26.611 provide the criteria for unit inclusion as follows:

39-31-202. To determine appropriate bargaining unit - factors to be considered.

In order to assure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees.

24.26.611 APPROPRIATE UNIT (1) In considering whether a bargaining unit is appropriate, the board shall consider such factors as:

- (a) community of interest;
- (b) wages;
- (c) hours;
- (d) fringe benefits and other working conditions;
- (e) the history of collective bargaining;
- (f) common supervision;
- (g) common personnel policies;

- (h) extent of integration of work functions and interchange among employees affected; and,
- (i) desires of the employees.

2. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and NLRB precedence as guidelines in interpreting the Public Employees' Collective Bargaining Act (the Act) as the state Act is so similar to the federal Labor Management Relations Act (LMRA). State Department of Highways v. Public Employees Kraft Council, 165 Mont. 349, 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976); State ex rel Board of Personnel Appeals v. District Court, 193 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local 45 v. State ex rel Board of Personnel Appeals, 195 Mont. 272, 653 P.2d 1310, 110 LRRM 2012 (1981); City of Great Falls v. Young (Young III), 221 Mont. 13, 683 P.2d 185, 119 LRRM 2682 (1984).

3. Unit clarification in this case involves "accretion" which is the process through which additional positions are added to a unit without a union election proceeding. The following consideration of each of the factors identified in ARM 24.26.611 leads to the conclusion

that the data processing unit positions should not be included in the unit.

(a) Community of interest.

In the global sense, the employees in the Yellowstone County courthouse have a community of interest perhaps described as county government services. Community of interest among employees involves persons who share common interest in wages, hours, and other working conditions of employment.

The data processing unit members are paid on a salary basis, work varied hours, and have work unit requirements which involve support, design, and subject matter access crossing nearly all county work functions. This work circumstance results primarily from the advent and essential use of computers in the work place. While their work involves exposure to many or nearly all Petitioner unit members, the community of interest of the data processing unit is that of data processing. The departments and offices described in the recognition clause which identifies the Petitioner unit involves processing of county business responsibilities. The data processing unit represents a support function to those persons or offices. The contract recognition clause describes the Petitioner unit (Exhibit 1) as follows:

ARTICLE II.

Recognition. The county recognizes the Association as the sole exclusive representative for all employees in the following departments and offices as certified by the Board of Personnel Appeals: Clerk and Recorder, Auditor, Treasurer, Civil Defense, Justice of the Peace, Custodial/Maintenance, Coroner, Superintendent of Schools, Elections, Central Services, Clerk of

Court, Surveyor, County Attorney's Secretarial/Clerical, Animal Control, and all non-sworn Deputies and Clerical employees in the Sheriff's Office, Extension Office Secretary(s), and Weed Department Secretary(s) and Court Services. Exclusions: All managerial, supervisory and confidential personnel, sworn Deputy Sheriffs and Dispatchers, District Court and Deputy County Attorneys, County Commissioners personnel, Health Department personnel, Road and Bridge personnel, Public Welfare personnel, Library personnel, Yellowstone Exhibition and Metra personnel, Extension Agents and Weed Department field workers.

(b) Wages.

The proposed unit members are salaried and not paid according to the Petitioner unit pay matrix. This factor shows a dissimilarity not a similarity on the wage rates.

(c) Hours.

The Petitioner unit members, generally speaking, work eight to five, Monday through Friday. The data processing unit members also work, generally speaking, these same hours but, because of use, availability or need for computer technology, adjustment or emergencies, are required to have the availability and flexibility to have, at times, an on-call status. This factor tends to separate rather than include the data processing unit positions from the Petitioner unit.

(d) Fringe benefits and other working conditions.

The data processing unit does have the same fringe benefits but as noted in the wages and hours factors, the working conditions are dissimilar.

(e) History of collective bargaining.

The only example offered relating to this factor involved a data processing employee, Mr. Swimley. He was considered a member of the unit and the disciplinary action leading to his termination followed the Petitioner unit disciplinary procedure. The Respondent indicated this was simply an error and/or limited only to use of the Petitioner unit disciplinary process. Therefore, this was insufficient to establish "a history" which the Petitioner suggests is identified by this single use of the disciplinary process. The process which included the discipline of Mr. Swimley does represent a history of collective bargaining. This was the only history incident representing a history of collective bargaining offered by the Petitioner. This factor at the very best would be neutral relevant to inclusion of the entire data processing unit based on a history of collective bargaining. Bargaining history is an important factor but to represent "history" the events or series of events must not be brief, ambiguous or inconclusive. In this case, one incident is insufficient to support inclusion of an entire data processing unit based on one disciplinary action relating to a former employee.

(f) Common supervision.

All county employees in a flow chart structure are subject to common supervision. The data processing unit, because of the technical and specialized nature of the work involved, is not subject to the same common supervision as other county office unit members. This factor also shows a dissimilarity between the data processing unit and the Petitioner unit members.

(g) Common personnel policies.

All county employees, including the data processing unit, are subject to the same personnel policies. This factor supports

inclusion of the data processing unit in the Petitioner unit.

- (h) Extent of integration of work functions and interchange among employees affected.

Analysis of this factor in a global sense would show interchange of work function which is the county business operation. On balance, however, other Petitioner unit members are not computer technicians or programmers. They simply expect and need the support provided by the data processing unit. Most importantly, however, is the fact that no other Petitioner unit members, and for that matter few, if any, fellow data processing unit members, can interchange with the individual data processing unit employees or members. This factor also weighs against inclusion of the data processing unit in the Petitioner unit.

- (i) Desires of employees.

None of the data processing unit employees expressed a desire to be a member of the Petitioner unit. The protection provided by the Montana Collective Bargaining Act for Public Employees and the National Labor Relations Act is provided for "employees". In this case, the "employees" desire was clearly to remain outside of and independent from the Petitioner union.

4. The Respondent in post-hearing brief correctly identified the position taken by the Montana Board of Personnel Appeals and the National Labor Relations Board relating to accretion. That analysis was as follows:

Unit Clarification has sometimes been referred to generically as "accretion" by various state and federal authorities. The overall guiding principle with Unit Clarification or accretion is the concept that in order to be successful, a petition must show an "overwhelming community

of interest" between a small group of employees as compared to a larger unit, because such a forced action places the smaller group, against its will, into the larger. Staten Island University Hospital v. NLRB, 24 F.3d 450, 455 (2nd Cir. 1994). Accretion therefore is only successful if one group of employees has no identity distinct from the other in this process. Id. at 455. Equally important, the Board of Personnel Appeals has historically placed great emphasis upon the desires of the employees when employing the unit determination and unit clarification criteria.

"The Board of Personnel has long placed great weight on the desires of employees when making determination of appropriate units for collective bargaining purposes... there is no reason to discontinue doing so. Under Section 39-31-201, MCA, the policy of the State is best promoted by allowing employees desires considerable weight."

Unit Determination 1-86, Pages 8-9.

In applying the statutory criteria to the facts from the testimony in this case, there must be a consideration as to whether the employees to be conscripted constitute a distinct, identifiable group, whether there are differences in their skills and functions, whether they have separate supervision, the frequency of their contact with other employees, the extent of integration and interchangeability of their job, duties and responsibilities with the unit as a whole and differences concerning wages and hours. NLRB v. French International Corporation, 999 F.2d 1409, 1410 (9th Cir. 1993). NLRB v. Stevens Ford Inc., 773 F.2d 468, 473 (2nd Cir. 1985). Accretion is a rare rather than a liberally applied theory since it serves to conscript additional employees without the benefit of a union election process thus requiring that "it should be employed restrictively, with close

cases being resolved... through the election process." Id. at 473 (citations omitted), Local 144 v. NLRB, 9 F.3d 218, 223 (2nd Cir. 1993). Further, because this is a narrowly applied theory precluding self determination, it should be applied only in situations where the smaller group has lost its separate independent identity. Local 144 v. NLRB, supra, 9 F.3d at 223. In situations where two groups of employees can be classified appropriately into separate, viable bargaining units, accretion is not permissible. Id. at 223. Moreover, where the group to be assumed into the union without election constitutes a separate bargaining unit, the employees of that unit have a right to choose whether or not they wish to elect a different bargaining representative or no representative. Id. at 223. NLRB v. Stevens Ford Inc., supra, 773 F.2d at 473.

Applying these principles to the facts of this present accretion attempt, the ultimate question becomes whether or not the union has met its burden of proof in presenting facts which satisfy the standards within Section 39-31-202.

5. The foregoing analysis leads clearly to the conclusion that the data processing unit is not appropriately included in the Petitioner unit.

6. Ms. Fairlee works interchangeably with the secretary for the Board of County Commissioners who is excluded from the unit on the basis of confidentiality. Because of her backup responsibilities and the sheer volume of work, Ms. Fairlee works with confidential information regularly and is aware of or may be exposed to confidential negotiation or bargaining strategy. She is found properly

excluded from the unit on the basis of the need for confidentiality. Ms. Fairlee also indicated her wish to remain independent or not included in the Petitioner bargaining unit.

7. Based on the foregoing analysis, Ms. Fairlee and the data processing unit are found not properly included in the Petitioner unit.

V. RECOMMENDED ORDER

The second secretary within the Board of County Commissioners and the data processing unit are not properly included in the Petitioner unit.

DATED this _____ day of August, 1995.

BOARD OF PERSONNEL APPEALS

By:

JOSEPH V. MARONICK
Hearing Officer

NOTICE: Pursuant to ARM 24.26.215(2), the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than _____. This time period includes the 20 days provided for in ARM 24.26.215(2), and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59604

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Brent Brooks,
Deputy Yellowstone County Attorney
P.O. Box 35025
Billings, MT 59107

Carter Picotte
Attorney at Law
Montana Public Employees' Association
1426 Cedar Street
Helena, MT 59601

DATED this _____ day of August, 1995.
